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No. 86-1049

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CITY OF LITTLE ROCK, ARKANSAS,
Petitioner,

vs.

DEBBIE WILLIAMS AND LINDA STANLEY,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
For the Eighth Circuit

BRIEF FOR CITY OF ST. LOUIS, MISSOURI, AMICUS CURIAE IN SUPPORT OF PETITIONER

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This brief is presented for the City of St. Louis, a political subdivision of the State of Missouri, and is sponsored by the authorized law officer of the City of St. Louis. The brief is filed pursuant to Supreme Court Rule 36.4. The petition for writ of certiorari supported by the City as amicus curiae was docketed on December 24, 1986, and this brief is filed within the time allowed for filing a brief in opposition to the petition.

INTEREST OF AMICUS

All local governments are vitally interested in the further development of the principles of municipal liability pursuant to 42 U.S.C. §1983 as they have progressed and will progress in the wake of *Monnell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978). The City of St. Louis has, however, a particular interest in the instant petition by virtue of the almost contemporaneous decision of the United States Court of Appeals for the Eighth Circuit adverse to the City in *Praprotnik v. City of St. Louis,* 798 F.2d 1168 (8th Cir. 1986). *Praprotnik,* decided August 19, 1986, was based upon the analysis contained in the original opinion in *Williams v. Butler,* see *Praprotnik,* 798 F.2d at 1173-1174, although *Praprotnik* extends *Butler* by holding that a decision constitutes city policy, even where the city provides an appeals process by which the decision may be reviewed, where the appeals process defers in substantial part to the original decision-maker's decision. *Praprotnik,* 798 F.2d at 1174-1175. Rehearing in *Praprotnik* was denied on September 19, 1986, and the City of St. Louis filed its petition for writ of certiorari with this Court on November 13, 1986. The petition was docketed as City of St. Louis v. Praprotnik, No. 86-772, and is pending. Meanwhile, the original opinion in *Williams v. Butler,* 746 F.2d 431 (8th Cir. 1984), upon which the *Praprotnik* opinion was based, had been affirmed by an equally divided court, 762 F.2d 73 (8th Cir. 1985); had been vacated on April 7, 1986 by this Court for reconsideration in light of *Pembaur v. Cinncinati,* 475 U.S. ____, 89 L.Ed.2d 452 (1986), see 89 L.Ed.2d 909 (1986); and was the subject of new opinion decided on September 26, 1986, once again reaffirming the judgment imposing liability upon the City of Little Rock. *Williams v. Butler,* 802 F.2d 296 (8th Cir. (en banc) 1986). Because *Praprotnik* and *Williams* were decided almost contemporaneously (rehearing denied in *Praprotnik* on September 19, 1986; decision filed in *Williams* on September 26, 1986), and because similar principles were the basis of both decisions, the two cases might properly be thought of as companion cases.

Should this Court grant the application of the City of St. Louis for certiorari, and ultimately reverse *Praprotnik,* it is likely that *Butler* will be reversed as well; conversely, should the Court grant the City of Little Rock's application for writ of certiorari, and should the City of Little Rock be successful, it is likely that the decision in *Praprotnik* will be inconsistent with that in *Butler.* Indeed, in the interests of judicial economy and of a comprehensive disposition of the issues presented by the two cases, the Court might see fit to grant both petitions and to consolidate the cases for briefing on the merits, and for oral argument.

REASONS FOR GRANTING THE WRIT

The Petition Should Be Granted Because The Definition Of Municipal Policy Employed Is In Conflict With The Decisions Of Other Federal Courts Of Appeals On That Issue; Because The Definition Is In Conflict With Applicable Decisions Of This Court; And Because This Case Provides The Court With An Opportunity To Resolve And Settle Definitively The Meaning Of "Policy" Upon Which 42 U.S.C. §1983 Liability May Be Imposed Upon A Local Government.

1. The Court of Appeals decides that liability may be imposed upon a municipal corporation for the discharge of two municipal court clerks by a municipal court judge (Butler) who sought revenge when he learned that the employees informed upon him to the police and testified before a grand jury regarding corrupt acts that they had witnessed. There was not a whit of evidence that the city council had adopted a policy of retaliatory firing, or that any city official other than Butler had adopted or carried out such a policy, or that there existed a city custom of retaliatory firing. The decision is based solely on the Court's belief that the City of Little Rock had conferred "final authority" regarding the termination of court clerks upon Butler, and that the grant of final authority transmuted Butler's employment decisions into Little Rock employment policy.

2. The Court's view that a municipal policy is made whenever a municipal employee makes a decision not subject to review by other municipal employees is inconsistent with the decisions of another federal court of appeals. In *Bennett v. Slidell,* 728 F.2d 762 (5th Cir. en banc 1984), the United States Court of Appeals for the Fifth Circuit reversed the judgment of the trial court imposing liability upon a city for the acts of the city's attorney and building inspector, finding that neither official made city policy. "But policymaking authority is more than discretion, and *it is far more than the final say-so,* as a matter of practice, on what water main will be replaced today and whether a building meets city construction standards." *Id.,* 728 F.2d at 769 (emphasis added). The instant opinion by the Eighth Circuit Court of Ap-

peals is based upon the fact that Butler was possessed of the final say-so, that is, final authority, and it is therefore inconsistent with *Bennett*. The Court should grant certiorari to resolve the conflict.

3. The unusually vigorous dissenting opinion of Judge Ross, on behalf of himself and four other members of the court below, argues that the majority opinion is rendered "entirely unsupported" by this Court's opinion in *Pembaur v. Cincinnati*, 475 U.S. ____, 89 L.Ed.2d 452 (1986). While this Court has not yet been able to muster a majority of its membership to endorse unambiguously a definition that conclusively determines the meaning of the term policy, it is clear that the instant opinion is inconsistent with all of the definitions of policy endorsed by the members of the Court.[1]

The less restrictive view is that put forward by Justice Brennan in his concurring opinion in *Oklahoma City v. Tuttle*, 471 U.S. ____, 85 L.Ed.2d 791 (1985), and further developed in part II-B of his opinion announcing the judgment of the court in *Pembaur*. Justices Marshall and Blackmun concurred in both opinions. Justice White did not join in Justice Brennan's opinion in *Tuttle*, but concurred in part II-B of Justice Brennan's opinion in *Pembaur*.

According to the less restrictive view, a policy is made where "a deliberate choice is made from among various alternatives by the officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur*, 89 L.Ed.2d at 465. Justice Brennan's view recognizes that unconstitutional acts of even policymakers are not ipso facto municipal policy, for it is necessary "that the unconstitutional act was taken *pur-*

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[1] The decision is, however, consistent with the views of Justice Stevens who continues to contend that §1983 liability may be imposed upon cities on a *respondeat superior* basis.

suant to municipal policy rather than simply resulting from such a policy in a 'but for' sense." *Pembaur,* 89 L.Ed.2d at 464-465, n. 10 (emphasis in original). Critical to the Brennan analysis is identification of the "subject matter in question" or "activity". *Pembaur,* 89 L.Ed.2d at 465. This is well illustrated in footnote 12 of Justice Brennan's opinion which, as Judge Ross' dissent correctly points out, is directly applicable to the case at bar. According to footnote 12, the identification of the particular subject matter in question takes place at a level of abstraction considerably beyond that of an individual hiring or firing decision; rather, the subject matter in question is defined as broadly as county employment policy. An individual hiring and policy decision does not become local government policy merely because the local government gives a particular employee discretion to make that decision; rather, the individual employment decision is transmuted into government policy only where the government has "delegated its power to establish final employment policy" to the particular decision maker.

The opinion in the instant case completely collapses the distinction between acts and decisions, as is revealed where the majority states that "if Butler had not possessed the final authority in this matter, if Williams had followed the grievance procedures available to employees outside the municipal courts, and if the city's properly constituted governing body had upheld the discharge, then clearly the city would have been liable for the governing body's action." Not so. The City would have been liable if the governing body had sustained the dismissal of plaintiff based upon the governing body's own impermissible motive. If the governing body had upheld the dismissal because it believed plaintiff was dismissed by Butler for a proper motive, even though it was later proven otherwise, the City would not be liable for it would not be the City that was at fault, only Butler. And Butler's vengeful unconstitutional act - admittedly a choice to follow a course of action made from among various alternatives - was not one made by a person with the authority to

establish final city employment policy, no more than the decision to shoot made by the police officer in *Tuttle* - equally a choice to follow a course of action made from among alternatives, and a decision that turned out to be more final than anything decided by Butler - was one made by a person responsible for establishing city policy with respect to whether the suspect should have been shot.

The more restrictive view is set forth in part II of Chief Justice Rehnquist's opinion in *Tuttle,* in which then Chief Justice Burger, Justice White, and Justice O'Connor joined; and it is further developed in Justice Powell's dissent[2] in *Pembaur,* in which Chief Justice Rehnquist and former Chief Justice Burger joined. Both Justice White and Justice O'Connor filed concurring opinions in *Pembaur.* Both concurring justices believes that the county sheriff and prosecutor had followed and implemented a pre-existing county policy. In view of this, and in view of their concurrence in Chief Justice Rehnquist's opinion in *Tuttle,* it seems fair to consider the views of both Justice White and Justice O'Connor as consonsant with those of the Chief Justice and Justice Powell. No extended analysis is necessary if the more restrictive view is followed; there was simply no evidence that the City of Little Rock had a rule of general applicability that those of its employees who cooperate with other city officials investigating corruption should be terminated; it is equally plain that the City of Little Rock did not fire plaintiffs as a result of a formal decisionmaking decision.

The decision below is in conflict with an applicable decision of this Court.

4. This appeal provides the Court with an opportunity to finally resolve and determine an important and unsettled question of federal law, to wit, whether every act of a local govern-

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[2] Justice Powell did not participate in *Tuttle.*

ment official that is not subject to review by other city officials constitutes city policy for which the city may be held liable. As we have argued above, this Court has recently come very close to formulating a definition of liability - engendering municipal policy acceptable to a majority of the Court's membership, but it has not quite succeeded. The change in the Court's membership suggests that this is a propitious time to again try to formulate a definition that will meet with the approval of a majority of the Court's members. Certainly the goal that would be achieved should the effort succeed would be one worthy of the effort involved. The importance of the principle involved can be well illustrated by considering the many potential applications of the principle adopted by the court below. On any given day, employees of a large city make literally tens of thousands of deliberate choices of whether to follow a course of action among alternatives. An assistant city counselor decides whether he will make argument A rather than B in the brief he is preparing; another city attorney decides to strike juror A rather than juror B from the panel; a sanitation worker chooses to collect garbage on the north side of the street rather than the south side of the street; the counter clerk decides that she will wait on citizen A rather than citizen B, when both arrive at her city office at the same time; the school teacher decides that she will teach spelling in the morning rather than the afternoon; the police officer determines how much force is necessary to effectuate a particular arrest; and on and on. In none of the cases is there an appeals process; in each of these cases the individual employee makes a choice among alternatives that is not subject to review. In no common understanding of the term have any of these persons made a policy on behalf of the city. And so it is with employment decisions. If the city council had made a decision that all employees who assist the city in exposing corruption should be fired, that would be city policy. If the city council was to decide that Debbie Williams and Debbie Williams alone, should be disciplined for exposing corruption, that would be city policy. Or even if it should decide that it would

not adopt policy on retaliatory firings, but rather that Judge Butler should establish the city's policy regarding whether employees should suffer retaliation for exposing corruption, that would be city policy. None of these things happened here. Butler was left the discretion to make an employment decision; he is supposed to have exercised that discretion unlawfully; but Butler's exercise of his discretion does not represent City policy in the absence of the delegation of the power to him to make City policy on retaliation. The Court should clarify this issue so as to avoid the error committed below.

CONCLUSION

Certiorari should be granted, and the judgment of the Court of Appeals should be reversed.

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